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Case No. 83-710

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARRY J. BERKEMER, SHERIFF
OF FRANKLIN COUNTY, OHIO
Petitioner,

v.

RICHARD N. McCARTY,
Respondent.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether *Miranda* warnings must be given to a person who has been arrested and is about to undergo jail interrogation for the misdemeanor of driving while under the influence of intoxicants, which offense is punishable by confinement for up to six months and carries a mandatory minimum term of three days?

2. Whether *Miranda* warnings must be given to a person who has been stopped by a police officer when the officer has probable cause to believe that the person has committed an offense; a reasonable person, under all the circumstances, would not feel free to leave; and the officer is about to interrogate the person?

3. Whether Petitioner, not having raised the issue in any court below, is now entitled to rely on the harmless error doctrine, and, if so, whether the admission of Respondent's jail statements was harmless beyond a reasonable doubt?

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RICHARD N. McCARTY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is now reported as *McCarty v. Herdman*, 716 F. 2d 361 (6th Cir. 1983), and is set out in the Joint Appendix at J.A.7.* The decision of the United States District Court for the Southern District of Ohio, Eastern Division, is unreported and is set out in the Appendix to Brief in Opposition to Petition at A.17. The decision of the Franklin County Court of Appeals in set out in the Appendix to Brief in Opposition to Petition at A.9.

*References to the appendix to the brief in opposition to petition for writ of certiorari are designated as "A." while references to the joint appendix are designated as "J.A."

JURISDICTION

Respondent accepts Petitioner's statement of jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATE STATUTES INVOLVED

Ohio Revised Code (Page's) Section 4511.19, Driving While Intoxicated (Eff. 1-1-75):

No person who is under the influence of alcohol or any drug of abuse, or the combined influence of alcohol and any drug of abuse, shall operate any vehicle, streetcar, or trackless trolley within this State. ...

Ohio Revised Code (Page's) Section 4511.99, Penalties (Eff. 3-15-79):

(A) Whoever violates Section 4511.19 of the Revised Code is guilty of a misdemeanor of the first degree, in addition to the license suspension or revocation provided in Section 4507.16 of the Revised Code. At least three days' imprisonment is mandatory under this division. ...

Ohio Revised Code (Page's) Section 2929.21, Penalties for Misdemeanor (Eff. 8-30-78):

(A) Whoever is convicted of or pleads guilty to a misdemeanor other than a minor misdemeanor shall be imprisoned for a definite term or fined, or both, which term of imprisonment and fine shall be fixed by the court as provided in this section.

(B) Terms for imprisonment for misdemeanors shall be imposed as follows:

(1) For a misdemeanor of the first degree, not more than six months. ...

(C) Fines for misdemeanors shall be imposed as follows:

(1) For a misdemeanor of the first degree, not more than one thousand dollars. ...

MISCELLANEOUS OHIO STATUTES

(See Appendix to this brief)

STATEMENT OF THE CASE

Respondent is satisfied with Petitioner's Statement of the Case, with the following additions:

At the time Respondent McCarty exited his automobile at the scene, Trooper Williams concluded that he would be charged with a traffic offense; and, therefore, his freedom to leave the scene was terminated. (Stipulation of Fact, A-1.)

A conviction of the offense Respondent McCarty was charged with, operating a motor vehicle while under the influence of alcohol or drugs, Ohio Revised Code (Page's) Section 4511.19, requires a mandatory three days' imprisonment, Ohio Revised Code (Page's) Section 4511.99, with a potential imprisonment of up to six months and fine of up to one thousand dollars, Ohio Revised Code (Page's) Section 2929.21.

Under Ohio Rules of Criminal Procedure, Rule 12(H), "The plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence."

SUMMARY OF ARGUMENT

I. *Inadmissibility of Respondent's Jail Statements*

Respondent was arrested for driving while intoxicated and was taken to jail. He was interrogated about the offense and made incriminating statements. At no time was he advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Since Respondent was subjected to custodial interrogation without advice, his statements were inadmissible. *Id.*

A. Petitioner misreads *Miranda* when he tries to limit it to situations of intense interrogation. Although *Miranda* did refer to some examples of brutality and although it cited some illustrations from police manuals of hard or intense interrogation, *Miranda* was clearly concerned with all custodial interrogation, not just some category of it. 384 U.S. at 447, 455, 457, 491-92.

B. Petitioner's effort to exempt all traffic offenses from the scope of *Miranda* is inconsistent with the concerns and objectives underlying *Miranda*. Under Petitioner's argument, the admissibility of incriminating statements in traffic misdemeanor cases would be governed only by the involuntary confession rule. Yet, it was precisely that rule, with its amorphous concepts of "involuntariness" and "totality of the circumstances," that *Miranda* found inadequate. Stone, *The Miranda Doctrine in the Burger Court*, 1977 Sup. Ct. Rev. 99, 102-3. As an alternative to the involuntary confession rule, *Miranda* applied the fifth amendment privilege against self-incrimination to custodial police interrogation. Recognizing, however, that custodial interrogation "contains inherently compelling pressures," 384 U.S. at 467, and fearful that suspects would, therefore, fail to claim their privilege as a result of the very fact of custodial interrogation, *Miranda* reformulated the fifth amendment privilege to require advice and waiver. Thus, the Court fashioned a *per se* rule as an alternative to the involuntary confession rule's

"totality of the circumstances" approach. Petitioner's argument is fundamentally in conflict with this development.

C. Petitioner's argument is inconsistent with other decisions of this Court delineating the scope of *Miranda*. This Court has applied *Miranda* to persons who were in physical custody even though the interrogation was brief and occurred in familiar surroundings. *Orozco v. Texas*, 394 U.S. 324 (1969); *Mathis v. United States*, 391 U.S. 1 (1968). By contrast, it has declined to apply *Miranda* where the suspect was questioned in the presence of impartial observers, *United States v. Mandujano*, 425 U.S. 564 (1976) (plurality opinion); where the suspect was not in physical custody, *Beckwith v. United States*, 425 U.S. 341 (1976); and where the suspect voluntarily went to the interrogation, was not under arrest, and was allowed to leave after the interrogation. *Minnesota v. Murphy*, ____ U.S. ____, 52 U.S.L.W. 4246 (1984); *California v. Beheler*, ____ U.S. ____, 103 S. Ct. 3517 (1983); *Oregon v. Mathiason*, 429 U.S. 492 (1977). Respondent was interrogated in the unfamiliar environment of the jail. He did not go there voluntarily; he was arrested. He was not free to leave during the interrogation, and was not allowed to leave after the interrogation. Consequently, he was entitled to *Miranda* warnings. Moreover, if *Miranda* warnings must be given to a pretrial detainee who is being questioned by a court appointed psychiatrist conducting a neutral competency examination, *Estelle v. Smith*, 451 U.S. 454 (1981), surely Respondent was entitled to them.

D. Petitioner's argument is inconsistent with the weight of lower court authority. Of the twenty-two jurisdictions whose cases are sufficiently definite to warrant consideration, fourteen apply *Miranda* to traffic misdemeanors. A decision for Respondent in the case at bar will, therefore, be less disruptive of state judicial processes than will a decision for Petitioner.

E. Miscellaneous arguments for not applying *Miranda* to traffic misdeameanors are meritless. (1) There is no reason

to believe that most persons arrested for driving while intoxicated would not understand *Miranda* warnings, nor is there reason to believe that it would be impossible to prove waiver in such cases. (2) Any potential confusion between *Miranda* advice and the state's right to inquire whether the driver will take an intoxication test can be avoided by first making the inquiry and obtaining the answer, and then giving the *Miranda* advice. (3) Although incriminating statements made by an intoxicated person may in rare instances be "involuntary" under the "totality of the circumstances," the existence of an "involuntariness" argument does not preclude reliance on *Miranda*. (4) There is no evidence that *Miranda* has significantly affected the rate of confession, crime clearance, and conviction. Thus, there is no reason to believe that *Miranda* will adversely affect traffic law enforcement. Moreover, custodial interrogation in traffic cases is rare. (5) The scope of the right to appointed counsel in misdemeanor cases should not control whether *Miranda* warnings are required. In any event, the offense for which Respondent was arrested, about which he was interrogated, and of which he was convicted, carried mandatory confinement. Ohio Rev. Code § 4511.99 (1979). Consequently, an indigent would have been entitled to appointed counsel under *Scott v. Illinois*, 440 U.S. 367 (1979).

F. The line that Petitioner seeks to draw between traffic misdemeanors and all other offenses is arbitrary, unprincipled, and unadministrable. Depending on the driver's prior record, some traffic offenses may be felonies. Thus, police officers who were investigating these offenses would not know whether they were dealing with misdemeanors or felonies, and would not know whether to give the *Miranda* warning. Moreover, what begins as a traffic misdemeanor investigation may escalate into an investigation for a more serious offense. If a line is drawn between traffic misdemeanors and all other offenses, the question will inevitably arise whether, and at what point, the investigation shifted

from one offense to another, or whether the traffic investigation was pretextual.

Nor should a line be drawn between the offense of impaired driving and all other offenses. Under that line, some felonies might be removed from the coverage of *Miranda* while some misdemeanors would remain.

Finally, no line should be drawn between all misdemeanors and felonies. The misdemeanor-felony line varies from state to state and even within a single state. Drawing a misdemeanor-felony line would give *Miranda* different meanings in different states, and would make it hard for police officers in the same state to know whether warnings are required.

II. *Inadmissibility of Respondent's Statements Made During Field Interrogation*

Respondent was sujected to field interrogation and made certain incriminating admissions without first being provided *Miranda* warnings by the officer. Prior to interrogating Respondent at the scene, the officer had probable cause to believe that a series of traffic violations had been committed by Respondent, including the offense of driving while under the influence of alcohol or drugs, in violation of Ohio Rev. Code § 4511.19 (1982).

A. Respondent was interrogated within the meaning of *Rhode Island v. Innis,* 446 U.S. 291 (1980) since the officer's express questioning was designed to elicit incriminating responses from Respondent concerning intoxicants he had consumed.

B. The field interrogation was not *general* on-the-scene interrogation, as permitted by *Miranda v. Arizona, supra,* since the officer had probable cause to believe Respondent committed serious traffic offenses and his field interrogation was designed to obtain admissions that would later be used against Respondent in court.

C. Respondent was in custody within the meaning of *Miranda v. Arizona, supra,* since, under an objective test a reasonable person would have concluded that he had been deprived of his freedom to leave.

D. Investigative stops by law enforcement officers pursuant to *Terry v. Ohio,* 392 U.S. 1 (1968), are not affected by Respondent's objective standard for determining custody.

Respondent submits that custody occurs when probable cause for arrest exists, in conjunction with an objective conclusion that Respondent was not free to leave the scene. The requirement of probable cause distinguishes Respondent's custodial status in the present case from the lesser permissible investigatory standard announced in *Terry.*

III. *Irrelevance of Harmless Error Doctrine*

Although Petitioner claims that the use of Respondent's jail statements was harmless error, he failed to raise the claim at any stage below as well as in his Petition for a Writ of Certiorari. Consequently, he should be precluded from raising the issue now. Parties opposing habeas relief should be held to the same standards of procedural regularity as parties seeking such relief. *Cf. Engle v. Isaac,* 456 U.S. 107 (1982).

In any event, Respondent's jail statements supplied important evidence that he had been driving while under the influence of intoxicants. Consequently, the use of the statements was not harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18 (1967).

ARGUMENT

INTRODUCTORY STATEMENT

The record makes it abundantly clear that a police officer stopped Respondent on probable cause to believe that he was driving erratically (A.2). Under all the circumstances, as Petitioner admits, Brief for Petitioner at 16-17, a reasonable person would not have felt free to leave. Within the meaning of *Rhode Island v. Innis*, 446 U.S. 291 (1980), the officer interrogated Respondent about the misdemeanor of driving while intoxicated (A.2). The interrogation produced incriminating statements, and the officer formally placed Respondent under arrest and took him to a jail (A.2). At the jail, Respondent was again questioned, and made further incriminating statements. Neither at the scene nor at the jail was Respondent advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) (A.3).

At issue in the case at bar is whether *Miranda* warnings were required in either setting. Petitioner's brief addresses these issues in chronological order—first the field interrogation statements and then the jail statements—and, under ordinary circumstances, we would follow suit. In the case at bar, however, the crucial statements are the ones made at the jail. If Petitioner is able to persuade the Court that *Miranda* is inapplicable to the jail interrogation, then, *a fortiori*, *Miranda* will be inapplicable to the field interrogation. For that reason, we shall depart from chronological order and first address the events that occurred at the jail. Then we shall discuss the field interrogation.[1]

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[1]Although the court below held the field interrogation statements admissible (J.A. 12-13) and although Respondent did not cross-petition on that issue, a cross-petition is unnecessary. *See* authorities collected in R. Stern and E. Gressman, Supreme Court Practice 478-79 (5th ed. 1978).

I. THE COURT BELOW CORRECTLY SET ASIDE RESPONDENT'S CONVICTION. *MIRANDA* WARNINGS MUST BE GIVEN TO A PERSON WHO HAS BEEN ARRESTED AND IS ABOUT TO UNDERGO JAIL INTERROGATION FOR THE MISDEMEANOR OF DRIVING WHILE UNDER THE INFLUENCE OF INTOXICANTS, WHICH OFFENSE IS PUNISHABLE BY CONFINEMENT FOR UP TO SIX MONTHS AND CARRIES A MANDATORY MINIMUM TERM OF THREE DAYS.

Point II of Petitioner's brief, which addresses the admissibility of the jail statements, is entitled "The Implied Consent Test and Alcohol Influence Report." Brief for Petitioner at 19. The title suggests that the issue of Respondent's statements is somehow related to the rules that permit compulsory intoxication tests, *Schmerber v. California*, 384 U.S. 757 (1966), and allow the state to make evidentiary use of an incriminating refusal to take such a test. *South Dakota v. Neville*, ____ U.S. ____, 103 S. Ct. 916 (1983). The suggestion is misleading. After he was arrested and taken to jail, Respondent was asked to take an intoxilyzer test, and he did. The test was negative (A.2). Immediately thereafter, without receiving *Miranda* warnings, he was interrogated (A. 2, 3). We do not question the State's authority under *Schmerber* and *Neville* to have an implied consent and compulsory testing process. We do urge, however, that it was constitutionally impermissible to interrogate Respondent without first giving the warnings required by *Miranda*.

Petitioner's basic argument, which spans both interrogation episodes, is that this Court in *Miranda* was concerned only with "lengthy, incommunicado" interrogations and with the interrogee's perception that the interrogation would continue "indefinitely." Brief for Petitioner at 12. Since, in Petitioner's view, interrogation for traffic offenses is not so

intense. Petitioner seeks the categorical exemption of traffic offenses from the coverage of *Miranda,* Brief for Petitioner at 20-22, even though Petitioner concedes that the Respondent was in custody. *Id.* at 26. Petitioner's argument was unanimously rejected by the court below with reference to the jail interrogation and should also be rejected by this Court. The argument is contrary to the language of *Miranda;* to the conditions that led to *Miranda,* and the concerns and objectives underlying *Miranda;* to other decisions of this Court delineating the scope of *Miranda;* and to the resolution of this issue in both the lower court cases and scholarly commentary. Moreover, there is no merit to the subsidiary arguments made by the Petitioner, by Amicus State of Ohio, or in a few of the lower court cases. Finally, the line that Petitioner seeks to draw between traffic misdemeanors and all other offenses is arbitrary, unprincipled, and unadministrable. We shall address each of these matters below.

A. Petitioner's Argument Is Contrary to the Language of *Miranda.*

This Court made it unmistakably clear in *Miranda* that a four-fold warning of rights must be given prior to police interrogation of a suspect in custody. That Respondent was interrogated by a police officer is undisputed. That he was under arrest is also undisputed. Brief for Petitioner at 6. That he was, therefore, in a status of "custody," as that word was defined in *Miranda,* cannot be gainsaid.

> By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.
>
> . . .
>
> Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal

> court proceedings and serves to protect persons *in all settings* in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.

384 U.S. at 444, 467 (emphasis added). See also *id.* at 445, 478. Although courts have occasionally questioned the meaning of "otherwise deprived of his freedom of action in any significant way," see cases collected in Kamisar, *"Custodial Interrogation" Within the Meaning of Miranda,* in Criminal Law and the Constitution—Sources and Commentaries 335 (1968), "custody" surely exists when a person has been arrested and taken to a police station or jail. Indeed, that was precisely the situation in *Miranda, Westover v. United States,* and *California v. Stewart,* three of the four cases that were decided under the name of *Miranda. See* 384 U.S. at 491, 494, 497. In the fourth case, *Vignera v. New York,* this Court applied *Miranda* to protect a suspect who was "picked up," taken to jail, and interrogated, even though the record apparently did not show a formal arrest. 384 U.S. at 493. Given that Respondent in the case at bar was formally arrested and taken to a jail, he must be deemed to have been in custody.

In an effort to avoid the force of this point as well as the fact that no language in *Miranda* explicitly creates a categorical exemption for any situation, traffic or otherwise, Petitioner and Amicus State of Ohio have constructed an argument that *Miranda* was solely or at least primarily concerned with brutal or otherwise hard or intense interrogation. See Brief for Petitioner at 12, 20; Brief for Amicus Curiae State of Ohio at 7-10. This argument profoundly misreads *Miranda.*

Although this Court in *Miranda* did refer to examples of brutality, 384 U.S. at 445-46, and although it cited illustrations from police interrogation manuals of hard or intense interrogation, *id.* at 449-55, this Court was quick to point

out that brutality is today "undoubtedly the exception," *id.* at 447, and it concluded, *id.* at 455, "Even *without employing brutality, the 'third degree' or the specific strategems described above, the very fact of custodial interrogation* exacts a heavy toll on individual liberty and trades on the weakness of individuals" (emphasis added). Thus, the Court's broader concern with *all* custodial interrogation clearly appears. Indeed, in the *Miranda* case itself, the entire interrogation, including the writing of the confession, took only two hours and involved no brutality or other opprobrious practices. *Id.* at 457, 491-92; *id.* at 518, 519 (Harlan, J., dissenting).

Petitioner's short-sighted view of *Miranda* is also refuted by the dissenting opinions in *Miranda.* The Justices who dissented clearly understood the majority opinion to be concerned with all custodial interrogation, not just some category of it. *See* 384 U.S. at 505 (Harlan, J., dissenting) ("to reinforce the nervous or ignorant suspect"); *id.* at 512 (Harlan, J., dissenting) (to eliminate "the subtle influence of the atmosphere and surroundings"); *id.* at 516 (Harlan, J., dissenting) ("minor pressures and disadvantages intrinsic to any kind of interrogation"); *id.* at 530 (White, J., dissenting) (majority opinion considers "in-custody interrogation, without more, to be a violation of the Fifth Amendment").

If the *Miranda* Court was concerned with all custodial interrogation, not just some category of it, why did it cite examples of brutal or otherwise intense interrogation? The answer is that, prior to *Miranda,* the fifth amendment privilege against compulsory self-incrimination was regarded by many as limited to "formal" proceedings, such as judicial hearings, at which answers could be compelled by the threat of contempt. Since the police did not have the contempt power, so the argument went, the privilege was inapplicable to police interrogation. C. McCormick, Evidence § 125 (2nd ed. 1972).

> In the course of toppling this "legal reasoning" the Court dwelt on the cases before it and many extracts from police interrogation manuals as the most *obvious* and *graphic examples* of the unreality, inadequacy and casuistry of the old reasoning. ...But *to limit the* impact of *Miranda* to the most poignant examples of the need for the applicability of the privilege to non-judicial, informal confrontations—as some state cases seem to suggest—mistakes, it is submitted, the "advocacy" in the *Miranda* opinion, if you want to call it that, for its scope.
>
> . . .
>
> ...A person significantly deprived of his freedom by an officer who then asks him questions relating to the crime being investigated is entitled to the *Miranda* warnings without regard to whether his plight amounts to, or approaches, the pressures operating on the defendants in the *Miranda* cases or those working on one being subjected to the psychological coercion recommended in police interrogation manuals.

Kamisar, *"Custodial Interrogation" Within the Meaning of Miranda,* in Criminal Law and the Constitution—Sources and Commentaries 335, 336, 337, 370 (1968) (emphasis in original) (citations omitted). *See also* Stone, *The Miranda Doctrine in the Burger Court,* 1977 Sup. Ct. Rev. 99, 104-5.

Petitioner's grudging interpretation of *Miranda* mistakes "advocacy" for "scope," and should therefore be rejected.[3]

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[3]It is worth noting that, in requiring advice about the appointment of counsel, the Court cited, at 384 U.S. 473 n. 42, *People v. Witenski,* 15 N.Y. 2d 392, 207 N.E. 2d 358 (1965). *Witenski* involved the right to appointed counsel at trial before a Justice of the Peace for

B. Petitioner's Argument Is Inconsistent with the Conditions that Led to *Miranda* and with the Concerns and Objectives Underlying *Miranda*.

Putting to one side the then-recent developments in *Massiah v. United States*, 377 U.S. 201 (1964), and *Escobedo v. Illinois*, 378 U.S. 1 (1964), *Miranda* was preceded doctrinally by the involuntary confession rule. Under that rule, a confession is constitutionally inadmissible if shown, by the "totality of circumstances" to be "involuntary." Comment, *The Coerced Confession Cases in Search of a Rationale*, 31 U. Chi. L. Rev. 313, 318 (1964). The deficiencies of the rule—particularly the difficulty of defining "voluntariness" and "involuntariness"—were widely noted even before *Miranda*. *See* L. Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 Ohio St. L.J. 449, 454, 457 (1964); Kamisar, *What Is an "Involuntary" Confession?*, 17 Rutg. L. Rev. 728 (1963) *(passim)*; Comment, *supra (passim)*. Although the Court said relatively little about the involuntary confession rule in *Miranda*, it hinted at its dissatisfaction, 384 U.S. at 448, and pointedly ignored the argument of the dissenting Justices that the rule worked well and should not be replaced or supplemented. *Id.* at 502-3 (Clark, J., dissenting); *id.* at 506-9 (Harlan, J., dissenting); *see id.* at 535 (White, J., dissenting). As a result, *Miranda* has been viewed consistently as motivated by a desire to create a clearer test than "involuntariness" and "totality of the circumstances." Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 Mich. L. Rev. 59, 94-104 (1966); Comment, *Miranda and Minor Of-*

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the petty misdemeanor of stealing $2.00 worth of apples. Thus, even though *Argersinger v. Hamlin*, 407 U.S. 25 (1972), was six years away, the Court, in fashioning *Miranda*, was aware that the right to counsel could be extended to minor offenses.

fenses, 14 Ariz. L. Rev. 766, 770, 785 (1972); Comment, *Miranda and Misdemeanors,* 14 Land & Water L. Rev. 521, 523, 524 (1979).

> Given the Court's inability to articulate a clear and predictable definition of "voluntariness," the apparent persistence of state courts in utilizing the ambiguity of the concept to validate confessions of doubtful constitutionality, and the resultant burden on its own workload, it seemed inevitable that the Court would seek "some automatic device by which the potential evils of incommunicado interrogation [could] be controlled."

Stone, *The Miranda Doctrine in the Burger Court,* 1977 Sup. Ct. Rev. 99, 102-3 (footnotes omitted), quoting from W. Schaeffer, The Suspect and Society 10 (1967).

The Court found that "device" in the fifth amendment's privilege against compulsory self-incrimination. Although *Massiah* was solely a sixth amendment right to counsel case and *Escobedo* largely that, *Miranda* is, beyond argument, a fifth amendment case. This is clear from the opening paragraph of the opinion, 384 U.S. at 439, and from everything that follows. *See id.* at 441, 442, 444, 458-64, 465, 467, 471, 476. The Court's major concern in *Miranda* was to establish the applicability of the privilege to the "informal" interrogation of a suspect in custody. In the Court's view, it was "at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries." *Id.* at 477.

In applying the fifth amendment to custodial interrogation, however, the Court immediately encountered a problem. Under the traditional view of the privilege, protection was gauged by a "claim-compulsion" test. That is, a person undergoing questioning was required to claim the privilege affirmatively. If he did, the questioner was then obligated to refrain from compulsion. If the person being questioned did not claim the privilege, however, his answers would not be

regarded as compelled. *Minnesota v. Murphy*, ____ U.S. ____, 52 U.S.L.W. 4246, 4248-49 (1984). Fearful that "the process of in-custody interrogation of persons suspected or accused of crime contains *inherently* compelling pressures," 384 U.S. at 467 (emphasis added); see also *id.* at 450, 455, 458, 477, 478, and that persons undergoing custodial interrogation would, therefore, fail to claim their privilege as a result of the very fact of custodial interrogation, the Court reformulated the fifth amendment to require both advice and waiver prior to custodial interrogation. *Id.* at 444, 467-79.

In reformulating the fifth amendment privilege in *Miranda*, the Court intended to fashion a *per se* rule as an alternative to the involuntary confession rule's "totality of the circumstances" test. This is too apparent from the Court's language to require extended discussion. *Id.* at 444, 468, 469 n. 3, 471-72, 473 n. 43. Indeed, the dissenting Justices so read the majority opinion, *id.* at 500 (Clark, J., dissenting); *id.* at 504 (Harlan, J., dissenting), and Justice White explicitly referred to the majority's approach as *"per se."* *Id.* at 539, 544. The very purpose of a *per se* rule is to avoid a close scrutiny of the totality of the circumstances on a case-by-case basis. If the rule works well enough in a range of cases, it will be made applicable to all, in the interest of establishing a bright-line standard. *See Illinois v. Lafayette*, ____ U.S. ____, 103 S. Ct. 2605 (1983); *New York v. Belton*, 453 U.S. 454 (1981); *United States v. Robinson*, 414 U.S. 218 (1973). Indeed, *per se* rules that originated in felony cases have been applied even to traffic misdemeanor cases. *United States v. Robinson, supra.* Although the *per se* rule in *Robinson* involved search incident to arrest and thus operated to the government's benefit, the concept of *per se* rules is party-neutral and should be applied even-handedly. That is all the Respondent asks in the case at bar.

Petitioner's argument that all traffic misdemeanors be excluded from the coverge of *Miranda* totally ignores the con-

cerns and objectives described above. If the argument is accepted, the only constitutional safeguard will be a legal test that has been tried and found wanting. If a "totality of circumstances" doctrine such as the involuntary confession rule works poorly in the high-visibility arena of felony court, it is doomed to fail miserably in the low-visibility arena of traffic court. *See* L. Herman, The Right to Counsel in Misdemeanor Court 80 (1973).

Petitioner's argument also ignores the fact, recognized by the court below (J.A. 10-11), that the fifth amendment privilege—the very heart of *Miranda*—is applicable to all criminal cases, traffic misdemeanors included. *State v. Pyle,* 19 Ohio St. 2d 64, 69, 249 N.E. 2d 826, 829 (1969) (dissenting opinion), *cert. denied,* 396 U.S. 1007 (1970); J. Israel & W. LaFave, Criminal Procedure—Constitutional Limitations 233 (3rd ed. 1980). Moreover, it ignores the fact—well known to anyone who has received even a traffic ticket—that traffic patrol officers "display [the] air of confidence in the suspect's guilt" that so concerned the Court in *Miranda. Id.* at 450; see also *id.* at 455. Finally, it ignores the psychological impact of "custody."

> [T]he imbalance between the state and the defendant begins with arrest and detention, for these experiences influence the detained in ways analogous to interrogation: the negative implications of silence, the self-mortification or extreme humiliation at being arrested, the desire to "shield the self" from potentially humiliating questioning and the emotional stress caused by the symbols of the law's authority even in persons of higher status.

Driver, *Confessions and the Social Psychology of Coercion,* 82 Harv. L. Rev. 42, 60 (1968).

Petitioner's argument ignores, and is inconsistent with, the conditions that led to *Miranda* and the concerns and ob-

jectives underlying *Miranda*, and should therefore be rejected.[3]

C. Petitioner's Argument Is Inconsistent with Other Decisions of This Court Delineating the Scope of *Miranda*

This Court has decided eight cases delineating the scope of *Miranda*. In chronological order, they are *Mathis v. United States*, 391 U.S. 1 (1968); *Orcozo v. Texas*, 394 U.S. 324 (1969); *Beckwith v. United States*, 425 U.S. 341 (1976); *United States v. Mandujano*, 425 U.S. 564 (1976) (plurality opinion); *Oregon v. Mathiason*, 429 U.S. 492 (1977); *Estelle v. Smith*, 451 U.S. 454 (1981); *California v. Beheler*, ____ U.S. ____, 103 S.Ct. 3517 (1983); and *Minnesota v. Murphy*, ____ U.S. ____, 52 U.S.L.W. 4246 (1984). Taken singly or together, they demonstrate that *Miranda* has been interpreted far more broadly than Petitioner is willing to recognize. For this reason, too, Petitioner's argument should be rejected.

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[3]Related to, but also separate from, the concerns discussed above, is another: that a suspect not incriminate himself in the misguided "belief that you must answer all questions put to you by a policeman, or at least that it will be the worse for you if you do not." 384 U.S. at 468 n. 37, quoting P. Devlin, The Criminal Prosecution in England 32 (1958). *See also* Kamisar, *Brewer v. Williams, Massiah, and Miranda: What Is "Interrogation"? When Does It Matter?*, 67 Geo. L. J. 1, 51 (1978). Some may perceive this concern as educative. Others may view it as an egalitarian effort to insure that the uneducated suspect is put on a par with the educated one. Whatever the correct characterization, *Miranda* repeatedly evidences the concern. 384 U.S. at 468, 469, 470, 471, 473. Even Justice Harlan's dissenting opinion recognized that the majority was concerned "to reinforce the nervous or ignorant suspect." *Id.* at 505.

Needless to say, Petitioner's argument against the requirement of advice is diametrically opposed to this educative or egalitarian concern.

In *Mathis,* the defendant, who was serving a prison sentence, was questioned in prison by an Internal Revenue Service agent. This Court held *Miranda* applicable even though the surroundings were familiar to the interrogee, 391 U.S. at 6 (White, J., dissenting); the questioning was part of a "routine tax investigation" that occurred before the Service had decided to invoke the criminal process, *see id.* at 4; *id.* at 6 (White, J., dissenting); the questioning was quite brief, hardly intense, and solely for the purpose of getting the interrogee to identify two tax returns and the signatures thereon as his and to consent to the extension of the statute of limitations with reference to each return, *id.* at 3 n. 2; and the interrogee was not in custody for the offense about which he was being interrogated. *Id.* at 2, 4. In the case at bar, by stark contrast, the interrogation occurred in unfamiliar surroundings; it occurred after the officer had decided to charge the Respondent and had arrested him; the interrogation was more extensive than in *Mathis;* and the Respondent was in custody for the very offense about which he was being interrogated. Given the result in *Mathis, Miranda* should, *a fortiori,* be held applicable to the case at bar.

In *Orcozo,* the suspect was awakened in his boarding-house bedroom at 4:00 a.m. by four officers. "From the moment he gave his name, according to the testimony of one of the officers, petitioner was not free to go where he pleased but was "under arrest.'" 394 U.S. at 325. In addition to being asked his name, the suspect was also asked whether he had been at a certain cafe, whether he owned a pistol, and where the pistol was. *Id.* This Court held that *Miranda* was applicable despite the fact that the surroundings were familiar and the interrogation was "very brief." *Id.* at 330 (White, J., dissenting). In the case at bar, by contrast, Respondent was in unfamiliar surroundings and was questioned more extensively.

Mathis and *Orcozo* quite clearly show

that the Court favors a rule-of-thumb approach, as-

sumed to be easily applicable, rather than a detailed inquiry into the coerciveness of the custody in a particular case.

United States v. Hall, 421 F. 2d 540, 544 (2d Cir. 1969), *cert. denied*, 397 U.S. 990 (1970). (Friendly, J., commenting on *Mathis*). These cases also show that the Court's concern in *Miranda* was far broader than the examples it culled from police interrogation manuals. In all respects, therefore, these cases belie Petitioner's argument.

Since *Orozco*, this Court has decided six "custody" cases. In five, it held that there was no custody and that *Miranda* was inapplicable. The five are *Beckwith*, *Mandujano* (plurality opinion), *Mathiason*, *Beheler*, and *Murphy*. In *Beckwith*, the suspect was questioned by Internal Revenue Service agents in the familiar surroundings of his home and office. 345 U.S. at 342, 344. He was allowed to leave the agents in order to dress, *id.* at 343, and was permitted to drive unaccompanied to his office to obtain business records. *Id.* at 344. In *Mandujano*, the suspect was questioned in the presence of impartial observers—grand jurors. 425 U.S. at 579. In *Mathiason* and *Beheler*, the suspect voluntarily went to the police station, was specifically told that he was not under arrest, and, after a brief interview, was allowed to leave. 429 U.S. at 495 *(Mathiason)*; 103 S.Ct. at 3518 *(Beheler)*. Finally, in *Murphy*, the suspect was interviewed in the familiar surroundings of his parole officer's office, 52 U.S.L.W. at 4249, the interview was arranged by "appointment at a mutually convenient time," *id.*, the suspect was not under restraint, *id.*, and he was permitted to leave after the interview. *Id.* The only reasonable inference to draw from these cases is that if, as in the case at bar, a suspect is formally arrested, taken to the unfamiliar environment of a jail, and there interrogated, custody exists and *Miranda* is, therefore, applicable. This conclusion finds strong support from the one post-*Orozco* case in which this Court found

custody to exist, *Estelle v. Smith.* In this case, the suspect was in jail awaiting trial on a capital charge when he was questioned by a psychiatrist designated by the trial court. In holding that the suspect was entitled to *Miranda* warnings, this Court stressed the fact that the suspect was restrained in a jail. 451 U.S. at 466-67. Moreover,

> [t]hat respondent was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, is immaterial.

Id. at 467. If *Miranda* warnings must be given to a jailed suspect who is questioned by a psychiatrist conducting a neutral competency examination, surely they must be given to an arrested suspect who is questioned in a jail by a police officer. Moreover, if, as in *Smith,* it is immaterial that the interrogator is a court-designated psychiatrist rather than a police officer, then the concerns and objectives underlying *Miranda* and subsequent cases are far broader than Petitioner is willing to admit.

Petitioner's argument is inconsistent with the decisions of this Court delineating the scope of *Miranda,* and should therefore be rejected.

D. Petitioner's Argument Is Inconsistent with the Weight of Lower Court Authority.

The brief of Amicus State of Ohio, at 2-3, cites eight lower court cases rejecting the application of *Miranda* to misdemeanors or traffic misdemeanors. For the opposite view, the only case referred to is the decision below. One might, therefore, be inclined to infer that the decision below is something of a novelty in American law. Precisely the opposite is true, however. It is the argument of Petitioner and Amicus State of Ohio that runs counter to the weight of authority.

Twenty-two jurisdictions have cases that are sufficiently definite to warrant inclusion. Of the twenty-two, fourteen jurisdictions apply *Miranda* to traffic midemeanors; eight do not. The fourteen are the Sixth Circuit, *McCarty v. Herdman,* 716 F.2d 361 (6th Cir. 1983) (the decision below); Arizona, *Campbell v. Superior Court,* 106 Ariz. 542, 479 P. 2d 685 (1971); Colorado, *People v. Ramirez,* 609 P. 2d 616 (Colo. 1980); Massachusetts, *Commonwealth v. Brennan,* 386 Mass. 772, 438 N.E. 2d 60 (1982); Minnesota, *State v. Kinn,* 288 Minn. 31, 178 N.W. 2d 888 (1970) (by implication); New York, *People v. Bartlett,* 82 Misc. 2d 152, 368 N.Y.S. 2d 799 (County Ct. 1975);[4] North Carolina, *State v. Lawson,* 285 N.C. 320, 204 S.E. 2d 843 (1974); North Dakota, *State v. Fields,* 294 N.W. 2d 404 (N.D. 1980); Oregon, *State v. Roberti,* 293 Ore. 59, 644 P. 2d 1104, *on reh.,* 293 Ore. 236, 646 P. 2d 1341 (1982), *pet. cert. filed,* August 20, 1982, No. 82-315; Pennsylvania, *Commonwealth v. Meyer,* 488 Pa. 297, 412 A.2d 517 (1980); Texas, *Newberry v. State,* 552 S.W. 2d 457 (Tex. Crim. App. 1977); Utah, *Holman v. Cox,* 598 P. 2d 1331 (Utah 1979); Washington, *State v. Darnell,* 8 Wash. App. 627, 508 P. 2d 613, *cert. denied,* 414 U.S. 1112 (1973); and Wisconsin, *State v. Bunders,* 68 Wisc. 2d 129, 227 N.W. 2d 727 (1975) (dictum). That these cases are in point is apparent from the fact that every one of them involved, as does the case at bar, a charge of driving while intoxicated.

The eight jurisdictions that do not apply *Miranda* to traffic misdemeanors are the Fourth Circuit, *Clay v. Riddle,* 541 F. 2d 456 (4th Cir. 1976); Delaware, *State v. Bliss,* 238 A. 2d 848 (Del. 1968); Florida, *County of Dade v. Callahan,* 259

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[4] *Bartlett* is one of three lower court decisions addressing the issue. The cases split two to one in favor of applying *Miranda. See People v. McLaren,* 55 Misc. 2d 676, 285 N.Y.S. 2d 991 (Dist. Ct. 1967) (*Miranda* applicable); *People v. Bliss,* 53 Misc. 2d 472, 278 N.Y.S. 2d 732 (County Ct. 1967) (*Miranda* inapplicable).

So. 2d 504 (Fla. App. 1971); Iowa, *State v. Gabrielson,* 192 N.W. 2d 792 (Iowa 1971), *cert. denied,* 409 U.S. 912 (1972) (*Miranda* inapplicable to simple misdemeanor, *i.e.,* any misdemeanor for which the maximum permissible confinement does not exceed 30 days); Louisiana, *State v. Angelo;* 251 La. 250, 203 So. 2d 710 (1967) (any misdemeanor); Missouri, *State v. Neal,* 476 S.W. 2d 547 (Mo. 1972); New Jersey, *State v. Macuk,* 57 N.J. 1, 268 A. 2d 1 (1970); and Ohio, *State v. Pyle,* 19 Ohio St. 2d 64, 249 N.E. 2d 826 (1969), *cert. denied,* 396 U.S. 1007 (1970) (any misdemeanor).[3]

We have excluded from our listing five jurisdictions in which the cases are ambiguous or somewhat off the mark. The five are California, *People v. Ceccone,* 260 Cal. App. 2d 886, 67 Cal. Rptr. 499 (1968) (*Miranda* applicable to traffic stop that escalated into marijuana possession charge); Mississippi, *Capler v. City of Greenville,* 207 So. 2d 339 (Miss.), *cert. denied,* 392 U.S. 941 (1968) (this case, frequently cited as holding against the applicability of *Miranda,* did not involve interrogation or incriminating statements; rather, the court rejected the argument that defendant was entitled to be advised of right to counsel for trial preparation purposes); Nebraska, *State v. Dubany,* 184 Neb. 337, 167 N.W. 2d 556 (1969) (held that defendant was not in custody; implication that *Miranda* would have been applicable with

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[3]The scholarly commentary has been uniformly critical of these cases. *See* J. Israel and W. LaFave, Criminal Procedure—Constitutional Limitations 233 (3rd ed. 1980); C. Whitebread, Criminal Procedures 308-11 (1980); Comment, *Miranda and Minor Offenses,* 14 Ariz. L. Rev. 766 (1972); Note, *Potentiality of Incarceration: A Proposed Standard for the Applicability of Miranda to Nonfelony Offenses,* 52 Ind. L.J. 450 (1977); Comment, *Miranda and Misdemeanors,* 14 Land & Water L. Rev. 521 (1979); Note, *Does Miranda Apply to Traffic Arrests?,* 27 Wayne L. Rev. 193 (1980); 22 Drake L. Rev. 184 (1972); 38 Mo. L. Rev. 652 (1973).

custody); New Hampshire, *State v. Desjardins,* 110 N.H. 511, 272 A. 2d 599 (1970) (same as *Dubany, supra,* but implication is weaker and opinion is ambiguous); and Oklahoma, *Byers v. Oklahoma City,* 497 P. 2d 1302 (Okla. Crim. App. 1972) (*Miranda* held applicable to traffic misdemeanor; in denying City's petition for rehearing, two of three judges said that *Miranda* applies only to those traffic misdemeanors that "form the foundation for a felony charge for a subsequent offense," *id.* at 1305; judges may have been referring to fact that under 47 Okla. Stat. Ann. § 11-902, a second offense DWI is a felony).

From this compilation, it is apparent that Petitoner's argument is contrary to the substantial weight of lower court authority. A decision for Respondent in the case at bar will therefore be less disruptive of state processes than will a decision for Petitioner.

Up to this point, we have been dealing with Petitioner's argument that *Miranda* was concerned only with hard or intense interrogation and should therefore not be applied to traffic misdemeanors. In response, we have tried to show that the argument is contrary to the language of *Miranda;* to the conditions that led to *Miranda,* and the concerns and objectives underlying *Miranda;* to other decisions of this Court delineating the scope of *Miranda;* and to the resolution of the issue in both the lower court cases and scholarly commentary. Now we turn to a miscellany of subsidiary arguments advanced by Petitioner, Amicus State of Ohio, and some of the lower courts.

E. The Miscellaneous Arguments Against Applying *Miranda* to Traffic Misdemeanors Are Meritless.

Petitioner argues that the very fact of intoxication means that a person arrested for driving while intoxicated will not derive much benefit from *Miranda* warnings. Brief for Petitioner at 23. This argument should be rejected out of hand

for a number of reasons. (1) The argument presumes that the arrestee is guilty. (2) Most traffic misdemeanors do not involve intoxication. Thus, the argument is too narrow to support Petitioner's position that Miranda should be inapplicable to all traffic misdemeanors. (3) In many felonies and nontraffic misdemeanors, the arrestee is also intoxicated. Carried one short step, Petitioner's argument would bar *Miranda* in these cases, too, contrary to Petitioner's position. Thus, Petitioner's argument is too broad. (4) In order to derive no benefit from a *Miranda* warning, a person would have to be so grossly intoxicated that he lacks knowledge of, and cannot gain knowledge from, his surroundings. Even if we look only at the universe of intoxicated drivers, such gross intoxication would be rare.

Related to the argument above is one tendered by Amicus State of Ohio that the very fact of intoxication will make it hard for the prosecution to prove that there was a proper waiver of *Miranda* rights, and that *Miranda* should therefore be inapplicable. Brief for Amicus State of Ohio at 18-19. This argument is subject to all of the responses noted above. Moreover, while gross intoxication may defeat waiver, *see People v. Roy,* 49 Ill. 2d 113, 273 N.E. 2d 363 (1971) (State conceded that there had been no waiver), courts are not quick to find such intoxication. *See People v. Moore,* 20 Cal. App. 3d 444, 97 Cal. Rptr. 601 (1971) (blood alcohol readings of .22); *People v. Duke,* 63 Misc. 2d 407, 311 N.Y.S. 2d 312 (App. Div. 1970); *State v. Pease,* 129 Vt. 70, 271 A. 2d 35 (1970) (rejecting argument that, as a matter of law, a blood alcohol reading of .187 negated waiver). Thus, the argument of Amicus is overstated.

Petitioner argues next that it would be confusing to give a *Miranda* warning and then ask the driver whether he will take an intoxication text. Brief for Petitioner at 23. Thus, Petitioner seeks to take advantage of this Court's decision in *South Dakota v. Neville,* ____ U.S. ____, 103 S. Ct. 916 (1983) that *Miranda* warnings need not precede asking a

driver whether he is willing to take the test, and that the prosecution may make evidentiary use of an inculpatory refusal. Petitioner's argument is merely another in a parade of overblown horribles. In actual practice, police frequently give *Miranda* warnings to persons arrested for driving while intoxicated. *See Campbell v. Superior Court, supra* at 695; *Commonwealth v. Brennan, supra* at 62; *State v. Kinn, supra* at 890; *State v. Lawson, supra* at 844; *State v. Fields, supra* at 405; *Holman v. Cox, supra* at 1333. Indeed, in *Neville*—the very case that Petitioner tries to take advantage of—a warning was given. 103 S. Ct. at 918 and n. 1. Although confusion is possible, *Holman v. Cox, supra,* there is no necessary inconsistency between *Miranda* warnings and intoxication tests. *Id.* Confusion can be avoided by the simple expedient of dealing with the intoxication test first, and not engaging in other interrogation until the driver makes a decision about the test. If the officer wants to interrogate after the decision has been made, he must then give *Miranda* warnings.

Petitioner argues further that since, by hypothesis, the driver is intoxicated, any statement he makes is arguably involuntary. Thus, courts will have to examine the totality of circumstances in any event, and the bright-line benefit of *Miranda* will be lost. Brief for Petitioner at 24. This argument, too, is footless. As with some of the arguments above, it presumes guilt, would not apply to most traffic misdemeanors, and would apply to felonies and nontraffic misdemeanors. Moreover, *Miranda* is merely an alternative to the involuntary confession rule; it did not overturn the rule. Any defendant may make both arguments, and no court has ever suggested that arguing involuntariness forfeits *Miranda.*

Amicus State of Ohio, after portraying the social problem of the impaired driver (which we do not question), concludes, at 21, that "the extension of *Miranda* to the impaired motorist context will serve to needlessly expend time during the arrest and processing procedures and provide for a built-

in pre-trial suppression motion regarding the knowing and intelligent waiver of the '*Miranda* warnings.'" Thus, Amicus suggests that applying *Miranda* will impede law enforcement. This argument, of course, does not apply to traffic offenses other than DWI. Therefore, it is too narrow to support Petitioner's position that *Miranda* should be inapplicable to *all* traffic misdemeanors. Putting that to one side, however, the argument is still insubstantial. As noted above, at least fourteen jurisdictions require *Miranda* warnings in traffic misdemeanor cases, including DWI cases. *See* p. 25, *supra*. There is no evidence of which Respondent is aware of a needless expenditure of time and a proliferation of pretrial suppression motions in these jurisdictions. Nor is there evidence that *Miranda* has hampered traffic law enforcement. *Miranda* does not prohibit a police officer from stopping and arresting a suspected motorist, compelling an intoxication test, or alternatively demanding to know whether the driver is willing to take the test and making evidentiary use of an incriminating refusal. Moreover, the required warnings are not triggered merely by custody. As the court below recognized (J.A. 12), *Miranda* applies only in situations of *"custodial interrogations"* which, in traffic cases, are *"rare."* But even if we look only at the universe of custodial interrogations, the fears of Amicus are unfounded. The fact is that *Miranda* has simply not had the baleful effect on law enforcement that many thought it would have. *See* Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 Denv. L. J. 1 (1970); Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 Mich. L. Rev. 1347 (1968); Seeburger and Wettick, *Miranda in Pittsburg—A Statistical Study*, 27 U. Pitt. L. Rev. 1 (1967); *Faculty Note, A Postscript to the Miranda Project: Interrogation of Draft Protesters*, 77 Yale L. J. 300 (1967); *Project, Interrogation in New Haven: The Impact of Miranda*, 76 Yale L. J. 1519 (1967). *See also* O. Stephens, The Supreme

Court and Confessions of Guilt 169-74 (1973). Although potential for generalization is undercut by problems in sampling and by the lack of comparative data, these studies tend to show that *Miranda* has not significantly affected the rate of confession, crime clearance, and conviction. There is therefore no reason to believe that *Miranda* will unreasonably or adversely affect traffic law enforcement.

The final substantive argument that we address in this portion of our brief concerns the relationship between the right to appointed counsel at trial and the giving of *Miranda* warnings. Although neither the Petitioner nor Amicus State of Ohio has made the argument, at least one case has denied the applicability of *Miranda* on the ground that the suspect would not have had a right to court appointed counsel at trial. *State v. Angelo, supra* at 711. This argument, too, should be rejected.

The most obvious ground for rejection is that, since the offense for which Respondent was taken into custody, and about which he was interrogated, carried a mandatory term of confinement, Ohio Rev. Code §§ 4511.19 (1982), 4511.99(A) (1982), an indigent would be entitled to appointed counsel. *Scott v. Illinois,* 440 U.S. 367 (1979). Thus, the argument is irrelevant to the case at bar. In some other case, however, under *Scott*'s "actual incarceration" standard, an individual about to undergo custodial interrogation might not have the right to appointed counsel at trial. What, if anything, should the officer be required to say in that situation? Our answer is in three parts. The first part is that, since the fifth amendment privilege is applicable to all criminal cases, the officer should, at the very least, be required to advise the suspect of his right to remain silent and of the cost of speaking. The second part of our answer concerns the right to retained counsel. That right is fully applicable to all criminal prosecutions, including even petty misdemeanor cases. L. Herman, The Right to Counsel in Misdemeanor Court 52-53 (1973). Consequently, the officer should also be

required to advise of the right to retained counsel. *Compare* Rule 2(b), Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates. The third part of our answer deals with the right to appointed counsel. What should the officer be required to say if the offense for which the suspect has been taken into custody is *punishable* by confinement? Since *Scott* mandates the appointment of counsel only in cases of actual incarceration, and since the officer cannot know at interrogation whether actual incarceration will be imposed, the only safe course is to require advice about the appointment of counsel. (A second reason for requiring advice will be discussed immediately below.)

Suppose, however, that the unusual arises: that the officer wants to conduct a custodial interrogation about an offense that is not punishable by confinement and for which, therefore, there is no sixth amendment right to appointed counsel under *Scott*. We still urge that the officer be required to advise of the right to appointed counsel. Our reason, applicable also to the situation described immediately above, is that the unavailability of the right to appointed counsel at trial should not control the giving of advice under *Miranda*. To demonstrate this, we briefly compare the right to appointed counsel at trial with the *Miranda* right to appointed counsel. If an indigent properly asserts the right to appointed trial counsel, the state has two alternatives: to provide counsel and go forward with the proceedings, or not to provide counsel and dismiss the charge. As is well known, the state almost always chooses the former and provides counsel. Thus, the right to counsel at trial is truly a right to the services of counsel. By contrast, if a suspect who has received *Miranda* advice asserts the right to appointed counsel, the interrogator also has two alternatives: provide counsel and try to go forward with the interrogation, or not provide counsel and cease the interrogation, as is required by *Edwards v. Arizona*, 451 U.S. 477 (1981). As is well known, the officer almost never provides counsel; rather, the interroga-

tion ceases. Thus, the *Miranda* right to counsel is not really a right to the presence and services of counsel, but is merely a mechanism for cutting off questioning. It is a "limited Fifth Amendment right to counsel," *Miranda v. Arizona*, 384 U.S. at 537 (White, J. dissenting), and does not implicate the sixth amendment. *United Staes v. Mandujano*, 425 U.S. at 581 n. 6. Advising a suspect of the right to appointed counsel simply gives him the opportunity to remain silent if he believes that he is not "competent to deal with the authorities without legal advice." *Michigan v. Mosley*, 423 U.S. 96, 110 n. 2 (1975) (White, J., concurring). Thus, even in a case in which it is clear that the suspect will not be entitled to appointed trial counsel, the officer should be required to give a complete *Miranda* warning in the unlikely event of custodial interrogation.

F. The Line that Petitioner Seeks to Draw Between Traffic Misdemeanors and All Other Offenses or Between Impaired Driving and All Other Offenses Is Arbitrary, Unprincipled, and Unadministrable.

Throughout his brief, Petitioner argues that the entire category of traffic misdemeanors should be excluded from the coverage of *Miranda*. Thus, Petitioner seeks to draw a line between traffic misdemeanors and all other offenses. The "other offenses" comprehend nontraffic misdemeanors and all felonies, whether traffic felonies or otherwise. In the conclusion of his brief, however, Petitioner refers only to "impaired driving" and "impaired motorists." Brief for Petitioner at 26. Thus, Petitioner suggests that the line should be drawn between the offense of impaired driving and all other offenses, including, presumably, even traffic misdemeanors that do not involve impaired driving. This is the same line suggested by Amicus State of Ohio. Neither line should be drawn by this Court.

Although most traffic offenses are misdemeanors, some are felonies. In Ohio, for example, reckless vehicular homicide is a felony. Ohio Rev. Code § 2903.06 (1983). A first offense of negligent vehicular homicide is a misdemeanor, but a subsequent offense is a felony. Ohio Rev. Code § 2903.07 (1983). In North Dakota, first and second offenses of driving while intoxicated are misdemeanors; a third offense, however, is a felony. *Solem v. Helm*, ____ U.S. ____, 103 S.Ct. 3001, 3004-5 n. 4 (1983). See also *State v. Neal, supra*, 476 S.W. 2d 547, 556 (Seiler, J., dissenting) (third offense DWI carries alternate felony punishment in Missouri); *State v. Macuk, supra*, 57 N.J. 1, 268 A. 2d 1, 9 (comparing then existing law of Pennsylvania under which DWI was punishable by confinement for three years). Given these variations, which certainly exist also in other jurisdictions, it is manifestly imprudent to draw a line between traffic misdemeanors and all other offenses. Upon encountering a vehicular homicide or DWI, a police officer will not know whether he is dealing with a felony or a misdemeanor. Thus, he will not know whether *Miranda* warnings are required. Nor would it be sensible to draw a line between impaired motorist offenses and all others. This line would result in *Miranda* warnings not being required in some felony cases, but being required in some misdemeanor cases. Moreover, a police officer often will not be able to determine easily whether a motorist is impaired by intoxicants or drugs or whether the motorist is impaired by some other condition, or whether the motorist is unimpaired. Thus, the officer will again not know whether to give *Miranda* warnings.

Related to these problems is the fact that a traffic misdemeanor investigation for impaired or other improper driving may escalate into an investigation for a more serious traffic offense or for a nontraffic offense. For example, in *Clay v. Riddle*, 541 F. 2d 456 (4th Cir. 1976), a case heavily relied on by Petitioner, see Brief for Petitioner at 8, 17, 21, a DWI

misdemeanor investigation led to a felony charge when it was discovered that the driver was a recidivist who had been barred from driving. Similarly, in *State v. Lewin*, 163 N.J. Super, 439, 395 A. 2d 211 (1978), *cert. denied*, 444 U.S. 906 (1979), a DWI investigation escalated into the more serious misdemeanor of negligent homicide when the victim of an accident died after the interrogation of the driver. See also *United States v. Schultz*, 442 F. Supp. 176 (D. Md. 1977) (investigation for erratic driving led to suspicion of marijuana possession and culminated in a charge of possessing a sawed-off shotgun); *United States v. Hatchell*, 329 F. Supp. 113 (D. Mass. 1971) (investigation for driving the wrong way on a one-way street ripened into a stolen car charge); *People v. Ceccone*, 260 Cal. App. 2d 886, 67 Cal. Rptr. 499 (1968) (investigation for running a red light escalated into charge of marijuana possession). If a line is drawn either between traffic misdemeanors and all other offenses or between impaired driving and all other offenses, the question will inevitably arise whether, and at what point, the investigation shifted from one offense to another, and whether, and at what point, the officer was required to give *Miranda* warnings. Unless the shift or escalation is held to be irrelevant, *see Clay v. Riddle, supra; but cf. Baldasar v. Illinois*, 446 U.S. 222 (1980), the officer will at some point be required to give advice. Thus a new issue—whether the shifting or escalation point had been reached—will be superimposed on *Miranda* doctrine. Moreover, an additional issue will arise: whether the officer used a traffic investigation without *Miranda* warnings as a pretext for investigating another offense that ordinarily would be subject to *Miranda*. This Court and others have been concerned with pretextual arrests in the fourth amendment context. *See United States v. Robinson*, 414 U.S. 218, 221 n. 1 (1973) (traffic arrest not a pretext for narcotics search); *id.* at 238 n. 2 (Powell, J., concurring, suggesting possibility of pretextual arrest in companion case);

see Gustafson v. Florida, 414 U.S. 260, 266 (1973) (Stewart, J., concurring); *Taglavore v. United States*, 291 F. 2d 262 (9th Cir. 1961) (traffic arrest held pretext for marijuana search). The same problem will arise in the *Miranda* context unless the incentive is removed. Requiring *Miranda* advice in all cases of custodial police interrogation will remove the incentive.

Petitioner's argument leaves important questions unanswered. If, as we infer from the bulk of Petitioner's brief, *Miranda* warnings must be given in nontraffic misdemeanor cases, why not in traffic misdemeanors also? If, as we infer from the brief of Amicus State of Ohio, *Miranda* warnings must be given in traffic misdemeanor cases that do not involve impaired drivers, why not in traffic misdemeanor cases that do? Neither Petitioner nor Amicus has even attempted to explain how the exclusion of a category of offenses from *Miranda* can be justified in light of what *Miranda* includes. The lines drawn by Petitioner and Amicus are arbitrary, unprincipled, and unadministrable. They should be rejected by this Court.

Similarly, this Court should reject a line that neither Petitioner nor Amicus has pressed: the misdemeanor-felony line. In a few cases, it has been held that *Miranda* is inapplicable to all misdemeanors. *State v. Angelo*, 251 La. 250, 203 So. 2d 710 (1967); *State v. Pyle*, 19 Ohio St. 2d 64, 249 N.E. 2d 826 (1969), *cert. denied*, 396 U.S. 1007 (1970). This line is subject to all of the criticisms voiced above. Indeed, because it would increase the number of offenses excluded from *Miranda*, it would also increase the number of occasions on which the problems discussed above would materialize. Additionally, there is no uniform definition of felony and misdemeanor. For example, in Ohio, any offense punishable by confinement for more than a year is a felony. Ohio Rev. Code § 2901.02(E) (1983). By contrast, the convicted *misdemeanant* in *State v. Angelo*, *supra*, received confinement for 16 months. Under a misdemeanor-felony line, Angelo would

not be entitled to *Miranda* warnings, but an Ohio suspect, whose offense was punishable by a year and a day, would.

Just as there is no common agreement on the definition of the terms, so there is no common agreement on classifying conduct as misdemeanor or felony. Each state is free to classify as it chooses. Hence, what is a felony in South Carolina may be a misdemeanor in Ohio. Adoption of the misdemeanor-felony line would therefore give *Miranda* different meanings in different states.

Just as the misdemeanor-felony line may vary from state to state, so may it vary within a single state. For example, whether an offense is one or the other in Ohio depends on such variables as the value of property, Ohio Rev. Code § 2913.02(B) (1983); the nature of property, *id.;* the age of the victim, Ohio Rev. Code §§ 2907.05(A)(3) and (B) (1982), 2907.06(A)(4) and (C) (1982), 2907.07(A) and (D) (1982); and the extent of the victim's injuries. Ohio Rev. Code §§ 2903.11(A)(1) and (B) (1983), 2903.13(A) and (C) (1982). See Appendix to this Brief. Given these variables and others mentioned above, such as the offender's prior record, an officer engaged in custodial interrogation often would not know whether he was dealing with a felony or misdemeanor, and thus would not know whether to give advice.

Because the misdemeanor-felony line varies from state to state and is unstable even within a single state, it should be rejected as a basis for delineating the scope of *Miranda. Miranda* should be held applicable to custodial interrogations for all misdemeanors, including traffic misdemeanors.

II. *MIRANDA* WARNINGS MUST BE GIVEN TO A PERSON WHO HAS BEEN STOPPED BY A POLICE OFFICER WHEN THE OFFICER HAS PROBABLE CAUSE TO BELIEVE THAT THE PERSON HAS COMMITTED AN OFFENSE; A REASONABLE PERSON, UNDER ALL THE CIRCUMSTANCES, WOULD NOT FEEL FREE TO LEAVE; AND THE OFFICER IS ABOUT TO INTERROGATE THE PERSON.

The record clearly shows that a police officer observed Respondent's automobile "weaving in and out of its expected lane of travel" (A.1). Consequently, the officer had probable cause to believe that the driver had violated Ohio Rev. Code §§ 4511.33 (1982) (driving within single lane) and 4511.39 (1982) (changing lanes without signalling). Additionally, the officer had reasonable grounds to believe that the driver had violated then-existing § 4511.20 (1982) (negligent operation of a vehicle) (superseded in 1983 by a reckless operation statute bearing the same number). *See* cases collected in *State v. Cichon,* 61 Ohio St. 2d 181, 399 N.E. 2d 1259 (1980). The officer then stopped Respondent's automobile (A.1) under circumstances which, as Petitioner admits, Brief for Petitioner at 16-17, would lead a reasonable person to believe that he was not free to leave. When Respondent got out of his automobile, he needed support to keep himself from falling (A.1). At this point, the officer had probable cause to believe that Respondent had violated Ohio Rev. Code § 4511.19 (1982) (driving while under the influence of alcohol or drugs), and decided to charge the Respondent (A.2). The officer interrogated Respondent without *Miranda* warnings and obtained incriminating statements.

On these facts, the court below apparently concluded that only general, on-the-scene questioning had occurred; that Respondent was not in "custody," within the meaning of *Miranda,* until he was subsequently arrested; and that warn-

ings were not required. With all due respect, we submit that the court below erred. Once a police officer has probable cause to believe that a traffic offense has been committed and stops the driver under circumstances that would lead a reasonable person to believe that he is not free to go, the driver is in "custody," within the meaning of *Miranda,* and should receive warnings before interrogation.

As we have argued in Point I, *Miranda* applies to all offenses, traffic misdemeanors included. *Miranda,* however, is not limited to the police station or jail. *Orozco v. Texas, supra.* Indeed, as the Court noted in *Miranda:*

> By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody *or otherwise deprived of his freedom of action in any significant way.*

384 U.S. at 444 (emphasis added). Moreover,

> the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons *in all settings* in which their *freedom of action is curtailed in any significant way* from being compelled to incriminate themselves.

384 U.S. at 467 (emphasis added). Although the italicized phrases are susceptible to different interpretations, they mean at the very least that the Court intended *Miranda* to be applicable to *some* instances of field interrogation. Kamisar, *"Custodial Interrogation" Within the Meaning of Miranda,* in Criminal Law and the Constitution—Sources and Commentaries 336 (1968); *see State v. Desjardins,* 110 N.H. 511, 272 A. 2d 599, 603 (1970) (dissenting opinion). Delineating those instances is the second major issue raised by the case at bar.

Petitioner argues that all on-the-scene questioning should be excluded from the coverage of *Miranda*. Brief for Petitioner at 13. Petitioner bases his position on a passage from the *Miranda* opinion. As quoted in Petitioner's brief, the passage is as follows:

> Our decision is not intended to hamper the traditional function of police officers in investigating crime. [Citation omitted.].... General on-the-scene questioning of citizens in the fact-finding process is not affected by our holding. *Miranda, supra,* 384 U.S. at 477

Brief for Petitioner at 13. The omitted portion of the quotation, however, is significant:

> When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint.

The omitted portion strongly suggests that *Miranda* warnings must be given to any person who is "under restraint," even if the restraint occurs on-the-scene and is part of a general inquiry. This interpretation would, however, require *Miranda* warnings prior to interrogation not only in connection with every traffic stop, but also in connection with every *Terry* stop. A *Terry* stop is a seizure of the person within the meaning of the fourth amendment and necessarily involves restraint. *Terry v. Ohio,* 392 U.S. 1, 16, 19 n. 6 (1968). Although it would be principled and consistent with the concerns underlying *Miranda* to require warnings in connection with both kinds of stops, we doubt that the time is ripe for marrying *Miranda* to *Terry,* and we need not go so far to prevail in the case at bar. Instead, we propose the following interpretation of the crucial passage from *Miranda* for cases of field interrogation: (1) The first issue should be whether

the interrogation constitutes "general on-the-scene questioning." If it does, *Miranda* is inapplicable even if some restraint is present. (2) If the interrogation does not constitute "general on-the-scene questioning," the second issue should be whether the interrogee was "in custody or otherwise deprived of his freedom of action in any significant way." If the answer is no, *Miranda* is inapplicable. If the answer is yes, the suspect is undergoing "custodial interrogation" and should be warned. In our view, this analysis is consistent with *Miranda's* concerns and its stationhouse application, and properly accommodates the interests that this Court sought to advance in *Terry*. As will be seen, application of our proposed test to the case at bar compels the conclusion that *Miranda* warnings should have been given prior to the field interrogation of Respondent.

A. Because the Officer Had Probable Cause to Believe that Respondent Had Committed Several Traffic Offenses, His Field Interrogation Did Not Constitute "General" On-the-Scene Questioning

Under our proposed test, the first issue is whether the interrogation of Respondent constituted "general on-the-scene questioning." There can be no doubt that the interrogation occurred on-the-scene (A. 1-2). For many courts that would be enough. *See* cases collected in J. Cook, Constitutional Rights of the Accused—Trial Rights 324 n. 94 (1974). These courts improvidently ignore the word "general," as does Petitioner in the instant case. *See* Brief for Petitioner at 13-15. The word "general" suggests a situation in which a police officer arrives at the scene of a crime but has no reason to believe that any particular person is implicated. It also suggests a situation in which a police officer, although perhaps suspicious, has no reason to believe that a crime has been committed. *See People v. Ceccone*, 260 Cal. App. 2d 886, 67 Cal. Rptr. 499, 503 (1968); *State v. Kinn*, 288 Minn. 31, 178 N.W. 2d 888, 891 (1970); Kamisar, "*Custodial Inter-*

rogation" Within the Meaning of Miranda, in Criminal Law and the Constitution—Sources and Commentaries 335, 364-65 (1968); *see id.* at 381 n. 7. In either situation, a police officer is likely to be less officious, thus less intimidating, in asking questions. On the other hand,

> [t]he more cause for believing the suspect committed the crime, the greater the tendency to bear down in interrogation and to create the kind of atmosphere of significant restraint that triggers *Miranda*....

United States v. Hall, 421 F. 2d 540, 545 (2d Cir. 1969), *cert. denied,* 397 U.S. 990 (1970). Thus, the word "general" plays an important role in *Miranda*'s concern with inherent coercion, and should not be ignored.

In the case at bar, the officer observed traffic offenses; he also observed the offender. When he questioned Respondent, he was not merely trying to ascertain whether an offense had been committed or who was implicated. Although the questioning occurred at the scene, it was not of a putative witness, but of the prime suspect, of a person whom the officer had probable cause to arrest. Under the circumstances, the interrogation can hardly be considered "general."

This conclusion opens the door to the second issue: whether, prior to the questioning, Respondent was "in custody or otherwise deprived of his freedom of action in any significant way."

B. Because a Reasonable Person Would Not Have Felt Free to Leave, Respondent Was "In Custody or Otherwise Deprived of His Freedom of Action in a Significant Way."

The question whether a suspect undergoing field interrogation is "in custody or otherwise deprived of his freedom of action in any significant way" has been much debated.

The cases are collected in the Petition for a Writ of Certiorari in *Oregon v. Roberti,* No. 82-315, and need not be recanvassed here. Various tests have evolved for resolving the crucial issue, and Petitioner criticizes all of them. Brief for Petitioner at 15-17. We agree with many of Petitioner's criticisms, and, to narrow the issue, briefly indicate our areas of agreement. First, we disclaim reliance on any "focus" test. Although probable cause to arrest is important to our analysis, it serves *only* to negate the element of generality in "general on-the-scene questioning." It does not serve the additional function of establishing custody or some other significant deprivation of liberty. Second, we disclaim reliance on any subjective test. The uncommunicated intent of the officer to restrain the subject could hardly have an effect on the suspect. Conversely, the subjective belief of the suspect that he is not free to go is an ill-considered basis for triggering *Miranda,* for the officer has no way of knowing the subject's beliefs. Third, we disclaim reliance on an "arrest" standard, *i.e.,* on a standard that finds custody only after the officer has uttered the magic words of arrest. Under this test, the officer is encouraged to delay uttering formal words of arrest. *See* Brief for Petitioner at 17.

The remaining test is objective: whether, on all the circumstances, a reasonable person would feel that he was not free to leave. This test is fair to suspects, for it will include most cases in which the suspect believes that he is not free to leave. It is also fair to police officers because, acting reasonably, they should know when a reasonable person would feel restrained. An objective test has been adopted by many courts. The First, Second, Fourth, and Ninth Circuits, as well as various state courts, employ an objective standard to determine the issue of custody.[4] The collective purpose of

[4]First Circuit cases providing for objective standard concerning custody: *Podlaski v. Butterworth,* 677 F. 2d 7, 9-10 (1st Cir. 1982); *Borodine v. Douzanis,* 592 F. 2d 1202 (1st Cir. 1979); *Fisher v. Scafati,* 439 F. 2d 307 (1st Cir.), *cert. denied,* 403 U.S. 939 (1971).

the judicial opinions utilizing an objective test is that custody is determined based upon an examination of the objective manifestation of the suspect's deprivation of liberty, rather than on the police officer's unexpressed personal intention. *See* cases collected in Footnote 6.

Petitioner states that "no reasonable person would feel that he was free to ignore the visible and audible signal of a traffic safety enforcement officer," and that no "motorist ordered by a police officer to step out of his vehicle would reasonably or prudently believe that he was at liberty to ignore that command." Brief for Petitioner at 16-17. We agree but Petitioner does not intend his remarks to be a concession; rather he uses them to attack the objective test. Unless we have completely misapprehended the thrust of Petitioner's argument, Petitioner seems to be saying that a perfectly useful and fair test should not be adopted because Petitioner will lose under it. This may be an honest position, but it is hardly a sufficient one.

Given the fairness and wide adoption of the objective test, we urge it on this Court. Under it, as Petitioner is forced to acknowledge, Respondent was "in custody or otherwise deprived of his freedom of action in a significant way." Thus,

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Second Circuit case adopting objective standard: *United States v. Hall, supra,* at 544-45. Fourth Circuit case adopting objective standard: *Moore v. Ballone,* 658 F. 2d 218, 227 (4th Cir. 1981). Ninth Circuit cases adopting objective standard: *United States v. Booth,* 669 F. 2d 1231, 1236 (9th Cir. 1981); *United States v. Leyva,* 659 F. 2d 118, 120-21 (9th Cir. 1981); *United States v. Estrada-Lucas,* 651 F. 2d 1261, 1266 (9th Cir. 1980); *United States v. Curtis,* 568 F. 2d 643, 646 (9th Cir. 1978); *Lowe v. United States,* 407 F. 2d 1391 (9th Cir. 1969). State court decisions adopting objective test to determine custody: *Commonwealth v. Meyer,* 488 Pa. 297, 412 A. 2d 517, 521 (1980); *Hunter v. Alaska,* 590 P. 2d 888, 895 (S. Ct. of Alaska 1979); *State v. Cassell,* 602 P. 2d 410, 414 (S. Ct. of Alaska 1979); *State v. Morse,* 127 Ariz. 25, 617 P. 2d 1141, 1144 (1980); *State v. Hatton,* 116 Ariz. 142, 568 P. 2d 1040 (1977).

Respondent was entitled to *Miranda* warnings preceding his field interrogation, and the court below properly set aside his conviction. But lest it be thought that we are urging this test only because Respondent will win under it, we hasten to add that the objective test and our earlier "probable cause" argument best accommodate and reconcile the interests underlying *Miranda* with the interests underlying *Terry*. We address that matter immediately below.

C. The Probable Cause—Reasonable Person Test Best Accommodates the interests of *Miranda* and *Terry*

As noted earlier, *supra* at 39, *Miranda* defined custody as it did for the very purpose of requiring warnings in some instances of field interrogation. If custodial interrogation were limited to the police station, "the police would need only to delay formal arrest or physical transfer of the accused to the station house in order to circumvent the constitutional safeguards that *Miranda* dictates." *Commonwealth v. Stites*, 427 Pa. 486, 235 A. 2d 387, 390 (1967). *See also* N. Soble, The New Confession Standards 56-58 (1966). The "probable cause—reasonable person" test removes the incentive.

The test is harmonious with the concerns of *Miranda*. It applies only when four elements are met: (1) the suspect is dealing with a police officer; (2) the officer wants the suspect to "come across" with information and makes his desires known to the suspect (the "interrogation" element of the *Miranda* formula); (3) the officer has probable cause to believe that the suspect has committed a crime, thus increasing the likelihood that the officer will act intimidatingly; and (4) the suspect is unable to avoid the pressure of the first three elements by leaving. None of these elements standing alone would suffice to establish "custody." All of them, taken together, should, for their combined effect significantly inhibits the assertion of the fifth amendment privilege, a core concern of *Miranda*.

The test is also harmonious with *Rhode Island v. Innis*, 446 U.S. 291 (1980). In *Innis*, this Court defined the interrogation element of *Miranda* as "express questioning" or "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301 (footnotes omitted). The latter part of the definition involves an objective test. The test that Respondent proposes for determining custody in the instant case is also objective and thus harmonizes with the test for interrogation.

The test also fully accommodates the values that this Court sought to vindicate in *Terry v. Ohio, supra.* Under *Terry*, a police officer may stop and temporarily detain a person if the officer has a reasonable and articulable suspicion that the person has committed, is committing, or is about to commit a crime. *See Adams v. Williams*, 407 U.S. 143 (1973). Probable cause is not necessary. Because the test that we propose requires probable cause as an element, it will not affect *Terry* stops. A police officer who makes a valid stop may question the suspect without *Miranda* warnings until the officer acquires probable cause to believe that the suspect has committed a crime. At that point, *Miranda* warnings must be given before further interrogation. Although the line between probable cause and reasonable suspicion is somewhat thin, it is a line that the police have worked with for sixteen years and with which they are familiar. They tread the line daily in deciding whether to arrest. They also tread the line every time they decide whether to take a suspect to the police station for interrogation. *Dunaway v. New York*, 442 U.S. 200 (1979). It is therefore fair to ask them to tread it again.

For the reasons stated above we urge this Court to hold that Respondent's field interrogation statements were unconstitutionally obtained.

III. NOT HAVING RAISED THE ISSUE IN ANY COURT BELOW, PETITIONER SHOULD BE PRECLUDED FROM NOW RELYING ON THE HARMLESS ERROR DOCTRINE. IN ANY EVENT, THE ADMISSION OF THE RESPONDENT'S JAIL STATEMENT WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

In Point III of his brief, Petitioner claims that the admission of Respondent's police station statements was harmless error. The most interesting feature of this claim is that it is now being made for the first time. It was not made at any stage below—not in the Franklin County Court of Appeals (*see* A. 4-8); not in the Federal District Court (*see* A. 10-12); and not in the Sixth Circuit of Appeals (Brief for Respondent, *McCarty v. Herdman*). Most importantly, Petitioner, having lost in the Sixth Circuit, did not include the harmless error issue in his Petition for a Writ of Certiorari. Rather the sole issue raised was whether *Miranda* applied to individuals arrested for misdemeanor traffic offenses.

The case at bar is a habeas corpus case. Those who seek habeas relief must carefully meet standards of procedural regularity. *See Engle v. Isaac,* 456 U.S. 107 (1982). No less should be required of the party opposing relief.

Rule 21(1)(a) of the Rules of the Supreme Court of the United States provides that "Only the questions set forth in the petition or fairly included therein will be considered by the Court." We urge this Court to hold that the harmless error issue is not "fairly included" within the question of whether *Miranda* applies to persons arrested for misdemeanor traffic offenses.

However, even if this Court permits Petitioner to raise the harmless error issue, Respondent should prevail. If this Court holds that all of Respondent's statements are inadmissable, the error was clearly reversible, and Petitioner does

not argue otherwise. Brief for Petitioner at 25. Conversely, if this Court should hold all statements admissible, there would be no error of any sort. Therefore, the harmless error issue arises only on the assumption that Respondent's jail statements are inadmissable, but his field statements are admissible. On that assumption, Petitioner argues that the jail statements "were merely repetitions of [Respondent's] earlier statements." *Id.* Petitioner, however, has misread the record.

The stipulated facts (A.2) show that after Respondent was stopped and "his freedom to leave the scene was terminated," he admitted under interrogation that "he had consumed two beers and had smoked several joints of marijuana a short time before." Respondent thus admitted to use. *Use,* however, was not the gravamen of the offense with which Respondent was charged and of which he was convicted. The essence of that offense is driving *under the influence* of intoxicants. Ohio Rev. Code § 4511.19 (1975). At the jail, Respondent took an intoxilyzer test. Its result—.000—tended to refute that he was under the influence. Then Respondent was asked by the officer whether he was under the influence. His answer, "I guess, barely," supplied evidence of the missing element. Surely, Respondent's statement was not merely a repetition of his earlier statements.

We do not contend that Respondent's jail statement was the only evidence of being under the influence. It was not. There were physical signs of unsteadiness (A. 1,2) and slurred speech (A. 2). But those signs, standing alone, might not have been enough to convict. Respondent's statement that he was under the influence related the physical evidence to the intoxicants. Thus, Respondent's statements directly supplied a link that otherwise would have been left to the vicissitudes of circumstantial evidence. Respondent's statement also made it much harder for him to attribute his unsteadiness to the limp and injured back that he had (*See* Alcohol Influence Report, side 2, J.A. 2, 3). Under the circum-

stances, it can hardly be said that the use of Respondent's jail statement was harmless beyond a reasonable doubt. *Chapman v. California*, 368 U.S. 18 (1967).

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of the Rules of the Supreme Court, I hereby certify that the requisite number of copies (3) of the foregoing Brief of Respondent have been served upon Petitioner, Harry J. Berkemer, by personal service of such copies to the office of Petitioner's counsel of record, Alan C. Travis, 369 South High Street, Columbus, Ohio 43215, by delivery to counsel for Petitioner or to an employee thereof, this 24th day of March, 1984.

I further certify that all parties required to be served have been served. The Petitioner's name is Harry J. Berkemer, and his address is 370 South Front Street, Columbus, Ohio 43215.

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MISCELLANEOUS OHIO STATUTES

Ohio revised Code (Page's) Section 2903.06, Aggravated Vehicular Homicide (Eff. 3-16-83):

> (A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall recklessly cause the death of another.
>
> (B) Whoever violates this section is guilty of aggravated vehicular homicide, a felony of the fourth degree. If the offender has previously been convicted of an offense under this section or section 2903.07 of the Revised Code, aggravated vehicular homicide is a felony of the third degree.

. . .

Ohio Revised Code (Page's) Section 2903.7, Vehicular Homicide (Eff. 3-16-83):

> (A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall negligently cause the death of another.
>
> (B) Whoever violates this section is guilty of vehicular homicide, a misdemeanor of the first degree. If the offender has previously been convicted of an offense under this section or section 2903.06 of the Revised Code, vehicular homicide is a felony of the fourth degree.

. . .

Ohio Revised Code (Page's) Section 2901.02, Classification of Offenses (Eff. 1-5-83):

As used in the Revised Code:

. . .

(E) Any offense not specifically classified is a felony if imprisonment for more than one year may be imposed as a penalty.

. . .

Ohio Revised Code (Page's) Section 2913.02, Theft (Eff. 1-5-83):

. . .

(B) Whoever violates this section is guilty of theft. If the value of the property or services stolen is less than three hundred dollars, a violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is three hundred dollars or more and is less than five thousand dollars, or if the property stolen is any of the property listed in section 2913.71 of the Revised Code, or if the offender has previously been convicted of a theft offense, a violation of this section is theft, a felony of the fourth degree. If the value of the property or services stolen is five thousand dollars or more, or if the offender has previously been convicted of two or more theft offenses, a violation of this section is grand theft, a felony of the third degree. If the property stolen is a motor vehicle, as defined in section 4501.01 of the Revised Code, a violation of this section is grand theft of a motor vehicle, a felony of the third degree.

Ohio Revised Code (Page's) Section 2907.05, Gross Sexual Imposition (Eff. 8-8-77):

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons, to have sexual contact when any of the following apply:

. . .

(3) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of such person.

(B) Whoever violates this section is guilty of gross sexual imposition. Violation of division (A) (1) or (2) of this section is a felony of the fourth degree. Violation of division (A) (3) of this section is a felony of the third degree.

. . .

Ohio Revised Code (Page's) Section 2907.06, Sexual Imposition (Eff. 8-8-77):

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following apply:

. . .

(4) The other person, or one of the other persons, is over twelve but not over fifteen years of age, whether or not the offender knows the age of such person, and the offender is at least eighteen years of age and four or more years older than such other person.

. . .

(C) Whoever violates this section is guilty of sexual imposition, a misdemeanor of the third degree.

Ohio Revised Code (Page's) Section 2907.07, Importuning (Eff. 1-1-74):

(A) No person shall solicit a person under thirteen years of age to engage in sexual activity with the offender, whether or not the offender knows the age of such person.

. . .

(D) Whoever violates this section is guilty of importuning. Violation of division (A) or (B) of this section is a misdemeanor of the first degree. Violation of division (C) of this section is a misdemeanor of the fourth degree.

Ohio Revised Code (Page's) Section 2903.11, Felonious Assault (Eff. 7-1-83):

(A) No person shall knowingly:

(1) Cause serious physical harm to another;

. . .

(B) Whoever violates this section is guilty of felonious assault, an aggravated felony of the second degree. If the deadly weapon that the offender had on or about his person or under his control in violating division [(A)] (2) of this section was a firearm, as defined in section 2923.11 of the Revised Code, the offender shall be

sentenced to a term of actual incarceration of three years and an indefinite term of imprisonment pursuant to division (B) of section 2929.71 of the Revised Code.

Ohio Revised Code (Page's) Section 2903.13, Assault (Eff. 1-1-74):

(A) No person shall knowingly cause or attempt to cause physical harm to another.

. . .

(C) Whoever violates this section is guilty of assault, a misdemeanor of the first degree.